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No. 89-1215

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.

Respondent.

BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

DANIEL J. POPEO
PAUL D. KAMENAR
JOHN C. SCULLY*
Washington Legal Foundation
1705 N Street, N.W.
Washington, DC 20036
(202) 857-0240

*Counsel of Record

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BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 125,000 members and supporters nationwide. WLF engages in litigation and the administrative process in a variety of areas promoting the free enterprise system and the economic and civil liberties of individuals and businesses.

To this end WLF has filed briefs *amicus curiae* in a number of the leading Supreme Court cases involving issues of civil rights. *See, e.g., Metro Broadcasting, Inc.*

v. Federal Communications Commission, 58 U.S.L.W. 5053 (June 27, 1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *United States v. Weber*, 443 U.S. 193 (1979).

WLF has also appeared *amicus curiae* before this Court in a number of cases affecting the free enterprise system. *See, e.g., Pacific Mutual Life Insurance Company v. Haslip, cert. granted*, 58 U.S.L.W. 3628 (April 2, 1990); *Kansas and Missouri v. Utilicorp United Inc.*, 58 U.S.L.W. 4898 (June 21, 1990); *H.J., Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2893 (1989); *Tull v. United States*, 481 U.S. 412 (1987); and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986). WLF has also appeared *amicus curiae* in *Oil, Chemical & Atomic Workers v. American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984) -- a case that dealt with OSHA and fetal protection policies.

Amicus is concerned with the rights of employees, employers, and the general public. *Amicus* is also concerned that unless employers are allowed to adopt reasonable safety standards, they will risk liability exposure that could bankrupt them. *Amicus* believes that Title VII of the 1964 Civil Rights Act, as amended, does not require employers to choose between violating Title VII or assuming the risk of going out of business because of the enormous liability created by fetal lead exposure. Rather, the risk of catastrophic tort liability is a proper defense to a charge of sex discrimination when the allegedly discriminatory policy is implemented to protect employees and their potential offspring from the risk of serious health problems resulting from occupational hazards.

Amicus submits this brief in support of the Respondent with the written consent of both parties. The parties' written consents are on file with the Clerk of the Court.

Amicus believes that the decision of the U.S. Court of Appeals was correct. *Amicus* will present arguments supporting tort liability as a BFOQ defense to a charge of sex discrimination; those arguments will not be presented by the other parties.

STATEMENT OF THE CASE

Amicus is, in the interest of brevity, omitting any statement of the facts of this case. *Amicus* adopts by reference the statement of facts contained in Respondent's brief.

SUMMARY OF ARGUMENT

Johnson Controls' fetal protection policy, while adopted for health and safety reasons, also shields the company from the risk of toxic tort liability resulting from fetal lead exposure. In the absence of that policy, the offspring of Johnson Controls' female employees might suffer serious injuries from lead exposure in the workplace. Those offspring, if injured, could have a cause of action against the employer. That tort liability could have a catastrophic effect on Johnson Controls' ability to do business.

Petitioners and the *amici* supporting Petitioners have suggested numerous defenses that Johnson Controls might use to defend against any such potential tort liability. However, those defenses may not insulate Johnson Controls from liability. When the risk of tort liability has the very real potential of putting an

employer, such as Johnson Controls, out of business, that risk is a proper defense to a charge of sex discrimination.

The potential tort liability faced by Johnson Controls reflects the value that society places upon the health and safety of both workers and their offspring. Permitting an employer to take into consideration the potential costs of tort liability serves the public interest in that it provides a means to measure the sometimes competing values of a healthy and safe workplace with that of a workplace free of any gender distinctions.

ARGUMENT

I. INTRODUCTION

Johnson Controls instituted its fetal protection policy as part of a comprehensive program to protect its employees and their families from the adverse effects of exposure to lead in the workplace. Johnson Controls did not adopt the policy to protect itself from potential tort liability. However, as Judge Posner asserted in his dissent in the case below, the potential costs of tort liability may supply the ground for a bona fide occupational qualification defense. *Amicus* respectfully suggests that the Court take this opportunity to state that evidence of social and economic costs arising out of potential tort liability can serve as the basis for a bona fide occupational qualification (BFOQ) defense.[1]

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[1]In the event this Court were to classify this case as a disparate impact rather than as a disparate treatment case, Johnson Controls would have available to it the defense that the policy serves in a legitimate way the employment goals of the employer. *See, Wards Cove Packing Co. v. Aton* 109 S.Ct. 2115 (1989). The arguments presented below regarding a bona fide occupational qualifi-
(continued...)

II. JOHNSON CONTROLS COULD BE EXPOSED TO TORT LIABILITY FOR EXPOSING FETUSES TO HAZARDOUS CHEMICALS

A. The Business Of Johnson Controls Requires That Some Employees Will Be Exposed To Lead

Johnson Controls' fetal protection policy protects it from a very real threat of tort liability that could put Johnson Controls out of business. Johnson Controls produces lead-based batteries. The "business purpose" of the Battery Division of Johnson Controls is the production of those batteries. As the district court found in this case, the use of lead is necessary to the production of batteries. *International Union v. Johnson Controls*, 680 F. Supp. 309, 317 (E.D. Wis. 1988).

Petitioners concede that, based upon the current state of technology, the production of batteries will necessarily expose some employees involved in that production to lead. (Pet. br. 5). *Amici* supporting Petitioners, NAACP Legal Defense and Educational Fund, Inc. and the National Black Women's Health Project, wax eloquent in their brief on the dangers to employees and their offspring posed by exposure to toxic chemicals. There is no question that exposure to certain levels of lead can cause damage to fetuses. That danger is not disputed by the Petitioners. (Pet. br. 4).

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[1](...continued)
cation (BFOQ) defense would also support a contention that Johnson Controls has gone forward with sufficient evidence to establish a *Wards Cove* defense. However, WLF, will restrict this brief to a discussion of why the potential for tort liability is a BFOQ defense.

It is also undisputed that in an attempt to protect employees and their offspring, Johnson Controls fully complied with the Occupational Safety and Health Administration's (OSHA) maximum lead exposure level standard. Johnson also took additional steps to minimize the risk of employee and fetal exposure to lead, including warning female employees of the potential dangers posed by exposure to lead in the workplace.

Despite taking protective steps, Johnson Controls concluded that the lead levels its employees were exposed to created a genuine risk of injuries to children born of female employees.

The district court below found that while there was disagreement amongst the experts, Johnson Controls carried its burden of showing that the fetal protection policy was necessary to avoid the significant and unreasonable risk of lead exposure to fetuses of employees. *Johnson Controls, Inc.*, 680 F. Supp. at 315. Consensus in the scientific community is not required to show that a considerable risk exists. *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982). Furthermore, if a toxic tort suit were to be filed against an employer, few state courts would be likely to accept evidence of a dispute regarding such dangers within the scientific community as a complete defense, particularly where the employer's own experts concluded that there was an unreasonable risk of fetal damage.

B. Fetal Exposure To Lead Subjects Johnson Controls To A Risk Of Catastrophic Tort Liability

The risk posed to fetuses made it necessary for Johnson Controls to take additional steps to eliminate

fetal exposure. As Judge Posner pointed out in his dissent below, Johnson Controls faced a very real risk of tort liability to children who suffered injuries resulting from their *in utero* exposure while their mothers worked at the plant.[2] This Court should be cognizant of such risks in formulating the proper contours of a BFOQ defense.

The risk faced by Johnson Controls to tort liability from employees' children was significant. Every jurisdiction permits lawsuits by children injured as a result of injuries sustained *in utero*. *Prosser and Keeton on the Law of Torts* § 55, at pp. 368-69 (5th ed. 1984). There are a number of cases in which children have claimed damages because of *in utero* exposure to toxic substances. *See, e.g. Security National Bank v. Chloride, Inc.*, 602 F. Supp. 294 (D. Kan. 1985); *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied sub. nom. R. Squibb & Sons v. Sindell*, 449 U.S. 912; *Enright by Enright v. Eli Lilly & Co.*, 553 N.Y.S.2d 494 (A.D.3 Dept. 1990).

The Trial Lawyers for Public Justice as *amicus* in support of Petitioners have suggested that a child would have a difficult time prevailing on a toxic tort claim against Johnson Controls due to problems of proof and causation. However, in light of Johnson Controls' admission that the levels of lead exposure are a risk to

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[2]While Judge Posner was correct in his analysis that the potential for tort liability can be a BFOQ defense, *amicus* disagrees with his conclusion that summary judgement was not appropriate.

fetal health, a potential plaintiff's problems with causation and proof may not be quite so difficult.[3]

C. Any "Risks" to Male Reproductive Systems Are Irrelevant to the Case at Bar

Amici Trial Lawyers for Public Justice and the states of Massachusetts *et al.*, in their briefs in support of Petitioners, attempt to shift the debate from the risks posed to children of fertile females exposed to lead to the alleged risks posed to children conceived by males who have been exposed to lead. The attempt to shift the debate is misguided.

If the record in this case showed scientific evidence of a real risk to the offspring of male employees and the employer chose to ignore that evidence, then that might very well be evidence that Johnson Controls was using its fetal protection plan as a pretext to engage in invidious sex discrimination. However, that is not the record. Petitioners and *amici* in support of Petitioners might like to re-litigate the case; however, they had the opportunity to establish a record regarding the offspring of male employees in the district court and failed in

[3]Of course, Johnson Controls could have adopted the OSHA standards and not done any further research into fetal dangers, thereby denying crucial evidence to potential plaintiffs and protecting itself. Fortunately, Johnson Controls acted responsibly. Such responsible corporate policy should as a matter of public policy be encouraged. If petitioners are successful, employers may have a disincentive to conduct further research and communicate frankly with their employees about the risks of fetal injuries.

their attempt to do so. It is too late for Petitioners and their *amici* to rewrite the record now.[4]

In summary, in the absence of a fetal protection policy Johnson Controls would be a prime candidate for a tort suit from a child born to an female employee who was exposed to lead.

III. JOHNSON CONTROLS CANNOT RELY ON THE DEFENSES TO TORT LIABILITY SUGGESTED BY PETITIONERS

Johnson Controls took every reasonable step possible -- short of shutting down operation of the Battery Division -- to remedy the problem of fetal lead exposure. The company was fully in compliance with the lead exposure limits set by OSHA, and it has warned employees of the dangers involved.

While Petitioners admit that "children may sue for torts committed before birth," they go on to argue unconvincingly that there is no legal theory that would permit employees' children to recover against Johnson Controls. Petitioners claim that Johnson Controls could "fulfill its duty of care by meeting OSHA standards, taking all actions that a reasonable company would take to further reduce exposure to the risk which an employer reasonably should be aware (such as providing respirators), and taking reasonable care to warn workers

[4]The risks faced by male and female workers and their offspring will not always be evenly distributed between the sexes. Petitioners and *amici* supporting Petitioners may wish that nature conformed to their ideological wishes, but industrial safety policy must be based upon scientific evidence and not upon what the parties wish the scientific evidence was.

about those significant risks of which an employer should be aware." (Pet. br. 35 n.31).

A. Warnings Are Not Likely To Protect A Company In A Fetal Toxic Tort Suit

What liability would Johnson Controls be subjected to if it took all technologically feasible steps to eliminate and minimize the dangers of fetal lead exposure and warned employees of those dangers but stood by and allowed fertile female employees to face the dangers? Contrary to what Petitioners argue, it is clear that Johnson Controls would be, as Judge Posner pointed out, "exposed to full common law damages, punitive as well as compensatory." *International Union, UAW v. Johnson Controls*, 886 F.2d 871, 904 (7th Cir. 1989) (en banc) (Posner, J., dissenting).

First, Petitioners suggest that warning employees will serve as a defense in a tort liability suit. *Amicus* agrees that warning employees of the dangers of lead exposure coupled with taking all reasonable steps to minimize lead exposure *should* relieve Johnson Controls of any tort liability for injuries suffered by the employees themselves. In the situation where the worker and the person at risk are one and the same person, it makes sense to let the worker make an informed decision as to whether to assume that risk. Such a warning may also limit the tort liability owed to a parent for the damages done to the employee's child.

A further difficulty with relying on warnings is the fact that there are two parents. What if the father of the child objected to the fetuses' exposure but the mother chose to continue working? It would be impossible for the employer to warn all of the sexual partners of all the fertile female employees -- any of those

partners could father a child later exposed *in utero* to dangerous levels of lead. While a court might also find the mother to be also liable in a toxic tort suit, the unwarned father may very well have a cause of action against the mother's employer.

Furthermore, warnings are often not sufficient to deter individuals from engaging in dangerous conduct. Warnings to pregnant women about the risks of cigarettes, alcohol, and illegal drugs have not stopped pregnant women from using those products. The evidence is clear that despite warnings some pregnant women continue to smoke and drink even though they are aware of the potential for injuries to their children resulting from such conduct. Johnson Controls' own experience with warnings indicated that they were not successful in deterring fertile employees from working in areas of potentially dangerous lead exposure.[5] If an employer knows that an employee is unlikely to heed his warning, then that warning is unlikely to be viewed as a valid defense to any suit brought by the employee's children.

A more significant problem is that employers owe a legal duty of care not only to their employees but also to the employees' fetuses. *Prosser and Keeton on the Law of Torts* § 55, at pp. 367-370 (5th ed. 1984). While an employer might be able to warn the parents of potential dangers, it is not in a position to warn the fetus of those dangers, and the fetus can not make a

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[5] An employee might even argue that if the warnings are sufficiently strong to be successful in deterring fertile women from working in areas where lead exposure could be dangerous to a fetus, then a warning might be a violation of Title VII, since the "scare" tactic had a disparate impact upon women in the workplace.

decision to act upon any warnings. Nor can a parent waive tort liability on behalf of an unborn child.

B. Compliance With OSHA Standards May Not Protect An Employer From Toxic Tort Liability

Petitioners also argue that compliance with Occupational Safety and Health Administration (OSHA) standards would be a defense in a toxic tort suit. Johnson Controls already complies with those standards. However, compliance with OSHA airborne lead exposure standards is no guaranteed shield against tort liability for damage done to a fetus. Some states have criminally prosecuted employers for workplace safety violations even when the employer is in compliance with OSHA standards. See, *People v. Chicago Magnet Wire Corp.*, 126 Ill. 2d 356, 534 N.E.2d 962 (1989), *cert. denied sub. nom. Asta v. State of Illinois*, 110 S.Ct. 52 (1989); *People v. Hegedus*, 432 Mich. 598, 443 N.W.2d 127 (1989); *State v. Black*, 144 Wis. 2d 745, 425 N.W.2d 21 (Wis. App. 1988).

Courts in those states, including Wisconsin (where this case arose), found that the federal Occupational Safety and Health Act (the "OSH Act") does not preempt state criminal prosecutions against employers in compliance with OSHA regulations; those cases suggest that tort actions against those in compliance with OSHA regulations are similarly unpreempted. Indeed, § 4(b)(4) of the OSH Act, 29 U.S.C. § 653(b)(4), is a "savings clause" that states explicitly that the OSH Act does *not* preempt state tort law. While an employer could point to his compliance with OSHA regulations as *evidence* that he acted reasonably, he nevertheless faces the risk that a jury could conclude otherwise. It is difficult to believe that Congress, when it adopted Title VII and the

OSH Act, intended to require employers to face that risk.

Moreover, an employer could not claim as a defense either OSHA preemption or compliance with OSHA standards in those areas where OSHA has not promulgated a specific safety or health standard.[6] The OSH Act explicitly leaves to the states jurisdiction over "any occupational safety or health issue with respect to which no federal standard is in effect. . . ." 29 U.S.C. § 777(a).

C. Title VII May Not Preempt A Toxic Tort Liability Suit

Petitioners' final claim is that the preemption provisions of Title VII would protect the employer from liability in a fetal toxic tort suit. 42 U.S.C. § 2000e-7,

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[6]In addition to regulating lead levels, OSHA has specific standards for only two other toxic substances that are related to fetal risks. 29 C.F.R. § 1910.1044 (1989) (dibromochloropropane); and 29 C.F.R. § 1910.1047 (1989) (ethylene oxide). There are no specific standards for other toxic substances that might have an effect on fetuses. Employers that use toxic substances in their work places other that the above two and lead would not have OSHA standards to rely upon. Furthermore, the OSH Act contains a general duty clause which requires employers to provide to "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 645(a)(1). A known toxic hazard that might cause the death or serious injury to the fetus of an employee might be covered by that clause. In such cases not only the states but OSHA itself might prosecute.

§ 2000h-4.[7] *Amicus* agrees that fairness dictates that an employer who takes action required by Title VII should be immune from any state-law tort liability arising from the required action. However, employers should not be forced to rely on the hope that Petitioners' interpretation of the Title VII preemption provisions will be adopted in future court decisions.

This Court will find Congressional intent to preempt state law in three circumstances: first, if Congress explicitly states such an intention; second, if Congress has regulated an area to such an extent that its intention to occupy the entire regulatory field is manifest; and third, where the state law at issue is actually in conflict with federal law. *English v. General Electric Co.*, 110 S.Ct. 2270, 2275 (1990).

Title VII does not explicitly preempt state tort law causes of action based on work-related fetal damage. Nor is federal regulation in that area so extensive that one can infer that Congress intended to occupy the field. Indeed, tort law is an area that has traditionally been subject to extensive state regulation. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). This Court

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[7]42 U.S.C. § 2000e-7 provides: Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful pr..ctice under this title.

42 U.S.C. § 2000h-4 provides: Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

has established a presumption *against* implicit federal preemption in areas of the law traditionally subject to regulation by the states. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

The only basis for a preemption claim would be a conflict between Title VII and state tort law in the area of fetal protection. There is no certainty that a court would find preemption on this basis in the future. A state court in a toxic tort suit might rule that there were steps that the employer should have taken -- other than excluding women -- to protect children. That might be true even though Johnson Controls is not aware of any equally effective alternatives to its fetal protection policy and even though the Petitioners have not demonstrated any such alternatives.

Given the potential for catastrophic liability exposure, an employer should not be required to guess what a court years from now will say the employer should have done. *Maybe* Title VII preemption protects the employer from a claim that it should have excluded women, but it cannot possibly protect employers from claims that they should have taken other steps -- steps not currently knowable -- short of exclusion. One would hope that the state courts would be reasonable and would not find in retrospect that an employer should have implemented safety measures not currently recommended by a consensus within the scientific community. But an employer should not be forced to rely on the reasonableness of state courts in these matters, especially given the pro-liability record of the state courts in tort actions in recent years. Accordingly, it is difficult to believe that Congress, in adopting Title VII, did not intend to permit employers to take reasonable fetal protection measures -- such as those adopted

by Johnson Controls -- in order to guard against future tort liability.

If Petitioners prevail in this action there will be only one way an employer could be certain of complying both with both Title VII and his legal duty to the unborn children. That is by going out of business. That way, there is no discrimination, and no injuries to children. However, such a solution is no real solution at all because everyone loses -- the employer, all the employees, and the consuming public.

In conclusion, the defenses suggested by Petitioners are unlikely to save Johnson Controls from future liability. Unless Johnson Controls and other, similarly-situated employers can be assured that they cannot be held liable for operations that expose fetuses to potentially hazardous conditions, those employers should not be forced to expose themselves to such potential liability.

IV. TORT LIABILITY CAN BE A DEFENSE TO A TITLE VII CHARGE

If an employer's business requires that some employees be exposed to toxic agents, such as airborne lead, and creates the very real danger of tort liability if fertile women are among those exposed, can such a workplace reality be a defense to a charge of sex discrimination under Title VII?

The Bona Fide Occupational Qualification (BFOQ)[8]

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[8]Section 703(e) of Title VII provides "it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those (continued...)

is a statutory defense to a charge of discrimination under Title VII. The Court of Appeals found that Johnson Controls could qualify for a BFOQ defense (as well as a "business necessity" defense), but it did so on other grounds, unrelated to the potentially devastating tort liability that could result in the absence of the challenged fetal protection policy. Nevertheless, the potential for such liability provides an alternative basis for upholding the Court of Appeal's finding of a valid BFOQ defense.

In order to establish a BFOQ defense in a sex discrimination case, an employer must show that the essence of the business operation would be undermined by not engaging in the discriminatory policy. *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977). In this case, the essence of the business of Johnson Controls' Battery Division is the production of lead-based batteries. That business would be undermined, if not completely put out of business, by the risk to the employer of tort liability if it allowed fertile women to be exposed to levels of lead that could harm a fetus.

Petitioners and *amici* in support of Petitioners dismiss the contention that tort liability can be the basis of a Title VII defense. They cite *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), for the proposition that costs do not constitute a defense. *Manhart* held that employers could not discriminate against female employees on the basis of the cost of benefit plans. Petitioners rely on that case for the argument that costs can never be a factor in a

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[8](...continued)
certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ."

defense in a Title VII action. However, *Manhart* is inapposite; it did not even involve a BFOQ defense.

Judge Easterbrook in his dissent also argued that *Manhart* was the final word on the issue of costs and Title VII. *Johnson*, 886 F.2d at 914 ("No firm could exclude women from its workforce by saying that higher costs of pensions and health care made them too costly"). While Judge Easterbrook's statement is obviously correct, the types of costs involved in *Manhart* are qualitatively different from the types of costs involved in this case.

The costs in *Manhart* involved normal expenses of a business. In contrast, the potential tort liabilities facing Johnson Controls are not normal costs of business. While every business takes into account pay and benefits as costs of doing business, no responsible business considers the costs of *avoidable* lawsuits arising from employee exposure to hazards as a normal cost of doing business.

In a situation involving cost differential in the payments of benefits, an employer could eliminate those cost differentials by eliminating pensions and health costs for all employees. Substitution of direct cash payments for benefits might permit an employer to be competitive in attracting employees and might even give an employer an economic advantage over competitors. However, short of closing its business there would be no practical way for Johnson Controls to cure the problem with which it is confronted.

Judge Easterbrook, in his dissenting opinion, states that Johnson Controls' fetal protection policy "only means that female employees' average cost to Johnson exceeds that of male employees." *Johnson*, 886 F.2d at

914. That, however, overlooks the very real possibility that the average cost of fertile female employees could be catastrophic. As Judge Posner stated, it is "difficult to estimate Johnson Controls' exposure to tort liability, but it would be premature, in this age of mass-tort suits (which for example have driven the asbestos industry into bankruptcy), to dismiss it as trivial." *Id.* at 905.

Fetal exposure to dangerous levels of lead may subject Johnson Controls to punitive as well as compensatory damages. The explosion of punitive damage awards and their potential economic impact is a topic that has been widely noted. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S.Cal. L.Rev. 1, 33-63 (1982); Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel*, 14 St. Mary's L.J. 351, 380-81 (1983); Owen, *Civil Punishment and the Public Good*, 56 S.Cal.L.Rev. 103, 119-121 (1982).

Juries have awarded punitive damages that could bankrupt some employers. *Seee, e.g., Dorsey v. Honda Motor Co.*, 655 F.2d 650, 654-58 (5th Cir. 1981) *cert. denied*, 459 U.S. 880 (1982) ($5,000,000 verdict upheld); *Airco, Inc. v. Simmons First Nat'l Bank*, 638 S.W.2d 660, 663 (Ark. 1982) (upholding award of $3,000,000 in vindictive damages); *Grinshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 821-24, 174 Cal. Rptr. 348, 389-91 (1981) (affirming trial court decision to reduce $125,000,000 jury verdict to $3,500,000); *Toyota Motor Co., Ltd. v. Moll*, 438 So.2d 192 (Fla. App. 1983) ($3,000,000 in punitive damages); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 741 (Minn.), *cert. denied*, 449 U.S. 921 (1980) (affirming punitive damages in amount of $1,000,000).

Toxic tort litigation already has driven into bankruptcy any number of companies that were associated with the manufacture of asbestos -- much of which was manufactured at the request of the federal government. *Special Project: An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573, 806-845 (1983).

The additional risk of punitive damages awards could drive a company out of business. A successful suit that would put Johnson Controls out of business and put the plaintiffs out of work, would, as Judge Posner pointed out, be a Pyrrhic victory where "the plaintiffs would be in the same position as if the occupational qualification defense had prevailed." 886 F.2d at 907. In both cases the plaintiffs would be out of work. In fact, Judge Posner was too generous to plaintiffs in his evaluation of the possible outcome in this case. Fertile women who choose not to be sterilized could, under Johnson Controls' fetal protection policies, seek other employment opportunities in the company where there would not be a danger to fetal health. If plaintiffs are successful in this lawsuit, there may not be any alternate jobs at which they could be employed -- since Johnson Controls' Battery Division may cease to exist.

While President Coolidge may have been overstating things when he said that "the business of America is business," it is certainly true that the business of business is business. Staying in business is the first priority of any business. If a BFOQ defense means anything, it surely means that employers cannot be required to hire employees who threaten the very existence of the business.

A policy that permits employers to use the risk of catastrophic tort liability exposure as a BFOQ defense would not interfere with the rule established in *Manhart*. First of all, it would not serve as a defense in those situations where an employer would engage in invidious discrimination and thereby pander to customers' prejudices and bigotry in order to increase business. Nor would the policy detract from the holding of this Court in *Manhart* that differential costs incurred in providing benefits provided to employees cannot justify sex discrimination.

An employer's desire to avoid tort liability should be considered a defense because it encompasses legal considerations independent of the economic consequences to the employer. Tort liability costs are a way of measuring costs imposed on society by the conduct giving rise to the liability. As Judge Posner pointed out, "The potential cost of tort liability to Johnson Controls is an approximation of the potential cost to the children who have suffered prenatal injury from the airborne lead absorbed into their mothers' blood streams." *Johnson*, 886 F.2d at 905. In other words, denying a BFOQ defense to Johnson Controls not only will damage Johnson Controls but will also impose significant costs on society as a whole -- employees, consumers, and (in particular) the children of employees. Nothing in *Manhart* requires such a result.

V. PUBLIC POLICY FAVORS A POLICY PERMITTING EMPLOYERS TO ADOPT FETAL PROTECTION POLICIES

Permitting consideration of potential tort liability as a BFOQ defense would serve the broader public interest of allowing employers to take into consideration societal costs. Those costs to society include costs incurred by

consumers, other employees (who would suffer if the employer was forced to close down), as well as the children exposed to lead. If an employer recognizes a health hazard and takes steps to prevent that danger, the courts should recognize the legitimacy of such conduct.

One can assume that the marketplace places an equal value on men and women as employees. If a company excludes fertile women from its employment pool, it will be economically disadvantaged because it thereby increases the bargaining power of those remaining in the employment pool. Accordingly, if a company acts rationally, it will not act against its economic interests in that manner unless there is a countervailing cost to the non-discriminatory policy. Johnson Controls is paying a cost in adopting its fetal protection policy by denying to itself otherwise qualified female employees, but it has rationally determined that that cost is outweighed by the costs it would incur if the policy were not adopted.

It is true that some companies might choose to discriminate invidiously on the basis of sex for no rational reason. In those instances, pretextual reasons given to justify the discriminatory policies are and should be illegal. However, there is no evidence that Johnson Controls adopted its fetal protection policy for any reason other than the stated reason of protecting the fetuses of employees. When such policies are adopted for non-pretextual reasons, the costs associated with tort liability serve as a useful measurement to employers of the value that society places on the safety and health of children. When fetal protection policies are not adopted for pretextual reasons, employers should be allowed to use those costs of liability as a defense in a Title VII action.

CONCLUSION

If Petitioners are successful, employers in the future may be faced with the Hobson's Choice of violating Title VII or subjecting unborn children to the risk of safety hazards and subjecting themselves to the risk of bankruptcy.

The solution called for by Petitioners is a utopian one. It would require nature to change so that health effects of lead exposure are evenly distributed between males and females. That cannot be done. Secondly, Petitioners would require technology to do what is not technologically feasible.

The likely result of a victory for Petitioners would be the shut-down of Johnson Controls' Battery Division. That would only create equality on the unemployment line, rather than on the production line.

For the foregoing reasons, *amicus* respectfully requests that the Court uphold the Seventh Circuit's decision.

DANIEL J. POPEO
PAUL D. KAMENAR
JOHN C. SCULLY*
Washington Legal Foundation
1705 N Street, N.W.
Washington, DC 20036
(202) 857-0240

*Counsel of Record

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